



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

COVARSIA DILL,
CDCR #T-85098,

Plaintiff,

vs.

IVES, Correctional Sergeant;
BARNHART, Correctional Officer;
AMSTEAD, Correctional Officer;
NURSE PANG; ROMAN, Correctional
Officer; and 2 UNKNOWN
CORRECTIONAL OFFICERS,

Defendants.

Civil No. 10-1494 W (CAB)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 2]**

AND

**(2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF COMPLAINT
PURSUANT TO FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

Covarsia Dill ("Plaintiff"), a state prisoner currently incarcerated at California State Prison Los Angeles ("LAC") in Lancaster, California, and proceeding in pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 in the Central District of California on June 2, 2010.

On July 2, 2010, Chief Judge Audrey B. Collins transferred the case to this court pursuant to 28 U.S.C. § 1406(a), finding that because Plaintiff's claims are alleged to have arisen at Richard J. Donovan Correctional Facility ("RJD"), and all Defendants are RJD officials alleged

1 to reside in San Diego, venue is proper in the Southern District of California, but not the Central
2 District. *See* Order Transferring Action [Doc. No. 3].

3 Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a) when he
4 filed this action in the Central District; instead he submitted a Motion to Proceed *In Forma*
5 *Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. Judge Collins made no ruling
6 regarding Plaintiff’s IFP Motion before transferring the action.

7 **I.**

8 **MOTION TO PROCEED IFP**

9 All parties instituting any civil action, suit or proceeding in a district court of the United
10 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
11 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
12 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
13 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
14 remains obligated to pay the entire fee in installments, regardless of whether his action is
15 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
16 (9th Cir. 2002).

17 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
18 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
19 statement (or institutional equivalent) for the prisoner for the six-month period immediately
20 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
21 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
22 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
23 (b) the average monthly balance in the account for the past six months, whichever is greater,
24 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
25 institution having custody of the prisoner must collect subsequent payments, assessed at 20% of
26 the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
27 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
28 § 1915(b)(2).

1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
 2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
 3 Plaintiff's trust account statement shows he has insufficient funds with which to pay any initial
 4 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
 5 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
 6 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
 7 fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
 8 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack
 9 of funds available.").

10 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP [Doc. No. 2], and
 11 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 12 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
 13 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

14 II.

15 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

16 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 17 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 18 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 19 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 20 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 21 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 22 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 23 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 24 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 25 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 26 § 1915A).

27 "[W]hen determining whether a complaint states a claim, a court must accept as true all
 28 allegations of material fact and must construe those facts in the light most favorable to the

1 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 2 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 3 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
 4 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 5 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
 6 pro se civil rights complaint, the court may not “supply essential elements of claims that were
 7 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 8 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations
 9 are not sufficient to withstand a motion to dismiss.” *Id.*

10 Here, Plaintiff claims that on March 14, 2009, Defendants acted with deliberate
 11 indifference to his safety by failing to protect him from his cell-mate who “slashed” him with
 12 a razor shank and “nearly” sexually assaulted him. (Compl. at 5-7.) Plaintiff further alleges
 13 Defendants “attempted to cover up” the incident afterward. (*Id.* at 7.)

14 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua
 15 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).¹ See *Lopez*, 203 F.3d at
 16 1126-27; *Farmer v. Brennan*, 511 U.S. 825 833-34 (1994) (“Prison officials have a duty ... to
 17 protect prisoners from violence.”). Accordingly, the Court finds Plaintiff is entitled to U.S.
 18 Marshal service on his behalf. See 28 U.S.C. § 1915(d) (“The officers of the court shall issue
 19 and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court
 20 may order that service be made by a United States marshal or deputy marshal ... if the plaintiff
 21 is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

22 III.

23 CONCLUSION AND ORDER

24 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

25 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 26 is **GRANTED**.

27
 28 ¹ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of,
 and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.”
Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the trust account in an amount equal to twenty percent (20%) of the preceding month's income credited to the account and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3. The Clerk of the Court is directed to serve a copy of this order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, California 94283-0001.

IT IS FURTHER ORDERED that:

4. The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon Defendants and shall and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and a certified copy of his Complaint and the summons so that he may serve Defendants.² Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and accurately as possible, and to return them to the United States Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt, the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed

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² Plaintiff must, of course, identify the "2 Unknown Correctional Officers" he includes as Defendants in his Complaint by their true names and thereafter substitute those individual persons for the currently unknown officers by amending his pleading to name those persons before the United States Marshal will be able to execute service upon them. *See Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995) (Doe defendants must be identified and served within 120 days of the commencement of the action against them); FED.R.CIV.P. 15(c) & 4(m). Generally, the use of Doe-type appellations to identify defendants is not favored, because as a practical matter, it is in most instances impossible for the United States Marshal to serve a summons and complaint upon an unknown Doe defendant. However, the Court will not dismiss Plaintiff's claims against the unknown correctional officers at this time. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)) (where identity of alleged defendants will not be known prior to filing of complaint, plaintiff should be given an opportunity through discovery and amend his complaint to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds).

1 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
2 See 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

3 5. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
4 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). See 42
5 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
6 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility
7 under section 1983," once the Court has conducted its sua sponte screening pursuant to 28
8 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on
9 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the
10 merits," the defendant is required to respond).

11 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
12 counsel, upon Defendants' counsel, a copy of every further pleading or other document
13 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
14 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
15 of any document was served on Defendants, or counsel for Defendants, and the date of service.
16 Any paper received by the Court which has not been filed with the Clerk or which fails to
17 include a Certificate of Service will be disregarded.

18
19 DATED: _____

8/6/10


HON. THOMAS J. WHELAN
United States District Judge